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10 division of Capital One N.A.

11 **UNITED STATES BANKRUPTCY COURT**

12 **DISTRICT OF ARIZONA**

13 In re:

14 Hilaria Burcham,

15 Debtor.

16 Capital One Auto Finance, a division of Capital
17 One N.A.,

18 Movant,

19 v.

20 Hilaria Burcham,

21 Respondent.

No. 4:16-bk-09718-SHG

Chapter 13 Proceeding

**MOTION FOR RELIEF FROM THE
AUTOMATIC STAY**

And

**MOTION FOR RELIEF FROM THE
CODEBTOR STAY**

Property Description:

2011 Chevrolet Malibu VIN

1G1ZC5E14BF123337

(hereafter the "Collateral")

22 Capital One Auto Finance, a division of Capital One N.A. (hereafter the "**Movant**" or
23 "**Secured Creditor**") is a secured creditor possessing a lien upon property more particularly
24 described below. Movant contends it is entitled relief from the automatic stay and the Codebtor
25 Stay because the contract secured by the Collateral is in default. Relief is requested under 11
26 U.S.C. §362(d)(1) and 1301. Movant requests the court to find:

a. That cause exists to terminate the automatic stay;

b. That cause exists to terminate the codebtor stay;

1 c. Waiving the fourteen (14) day provision of Bankruptcy Rule 4001(a)(3) that would
2 stay the effectiveness of any Order is appropriate;

3 d. That any Order lifting the stay will be binding in the event this matter is converted
4 to another proceeding under the Bankruptcy Code; and,

5 e. That Movant may file an amended proof of claim for any deficiency balance within
6 thirty (30) days of disposition of the Collateral, or by the claims bar date, whichever is
7 later.

8 The following Memorandum of Points and Authorities support this Motion.

9 MEMORANDUM OF POINTS AND AUTHORITIES

10 1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(b)(2)(G)
11 and 11 U.S.C. § 362.

12 2. **Hilaria Burcham** shall be referred to as the **Debtor. Hilaria Burcham and Bryan**
13 **W. Burcham** executed and delivered to Secured Creditor a contract (hereafter the “**Contract**”).

14 3. Repayment of all amounts due on the Contract is secured with the following
15 described collateral:

16 **2011 Chevrolet Malibu VIN 1G1ZC5E14BF123337**

17 (hereafter referred to as the “**Collateral**”)

18 4. Exhibit 1 is a true and correct copy of the Contract and it is incorporated herein by
19 reference.

20 5. The Secured Creditor’s lien on the Collateral is properly perfected. See Exhibit 2:
21 Records from the Arizona Department of Transportation, Motor Vehicle Division reflecting
22 Secured Creditor’s lien.

23 6. Movant is the owner and holder of the Contract and the documents securing
24 repayment of all amounts due.

25 7. Payments have not been made pursuant to the terms of the Contract.

26 8. The failure to make timely payments prejudices Secured Creditor.

9. Payments are due under the Contract.

10. Debtor surrendered possession of the Collateral to Creditor.

11. Debtor's plan provides for the surrender of the Collateral (ECF 42 paragraph number 6).

12. There is little or no equity in the Collateral.

13. The amount of the debt as of the date of the filing of this Motion is \$30,045.87.

14. The National Automobile Dealers Association (“**NADA**”) places the retail value of the Collateral at \$8,050.00. See Exhibit 3: Valuation Evidence.

15. Movant is entitled to relief from the Automatic Stay for cause, because payments are not being received in accordance with the Contract.

16. Movant further request the Court waive the provisions of Bankruptcy Rule 4001(a)(3), which would stay the order for relief until the expiration of 14 days after the entry of the order.

LEGAL ANALYSIS

Pursuant to Bankruptcy Code § 362(d)(1) and 1301, relief from the automatic stay shall be granted “for cause,” including, without limitation, lack of adequate protection. *See*, 11 U.S.C. §362(d)(1).

In addition, a party with an interest in property is entitled to relief from the automatic stay if: (i) the debtor lacks equity in the property, *and* (ii) the property is not necessary for an effective reorganization that is in prospect. See, 11 U.S.C. § 362(d)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 108 S. Ct. 626, 98 L.Ed.2d 740 (1988).

Movant seeks relief from the Codebtor Stay to allow Movant to exercise its rights in the Collateral.

A. Sufficient “Cause” Exists to Grant Relief from The Automatic Stay.

Pursuant to 11 U.S.C. § 362(d)(1), a party-in-interest may be granted relief from the automatic stay for cause. The term “cause” is not defined in the Bankruptcy Code and must be

1 determined on a case by case basis. *MacDonald v. MacDonald (In re MacDonald)*, 755 F.2d 715,
2 717 (9th Cir. 1985) (citations omitted); *see also In re Delaney-Morin*, 304 B.R. 365, 369 (9th Cir.
3 B.A.P. 2003).

4 **B. Termination of the Stay is Appropriate Under 11 U.S.C. § 362(d)(2) Because**
5 **There is No Equity in the Collateral and There is No Need for the Collateral as**
6 **part of the Reorganization.**

7 As alternative grounds for relief from the automatic stay, Movant alleges that there is no
8 equity in the Collateral, and the Collateral is not necessary for an effective reorganization.
9 Pursuant to 11 U.S.C. § 362(d)(2), a party in interest may be granted relief from the automatic stay
10 if: (i) the debtor does not have equity in the property; and (ii) the property is not necessary for an
11 effective reorganization. Once the Movant establishes that there is no equity in the Property, “it is
12 the burden of the debtor to establish that the collateral at issue is ‘necessary to an effective
13 reorganization.’” *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. at 375-376. “What this
14 requires is not merely a showing that if it is conceivable to be an effective reorganization, this
15 property will be needed for it; but that the property is essential for an effective reorganization that
16 is in prospect.” *Id.* (emphasis original).

17 **REQUEST FOR RELIEF**

18 For the reasons set forth above, Movant respectfully requests the following:

- 19 A. That cause exists to terminate the automatic stay;
- 20 B. That cause exists to terminate the codebtor stay;
- 21 C. Waiving the fourteen (14) day provision of Bankruptcy Rule 4001(a)(3) that would
22 stay the effectiveness of any Order is appropriate;
- 23 D. That any Order lifting the stay be binding in the event this matter is converted to
24 another proceeding under the Bankruptcy Code; and
- 25 E. That Movant may file an amended proof of claim for any deficiency balance within
26 thirty (30) days of disposition of the Collateral, or by the claims bar date, whichever is later.

Dated: August 22, 2017.

1 WINDTBERG & ZDANCEWICZ, PLC

2 /s/ Michael Zdancewicz (#012426)

3 Michael Zdancewicz

4 Marc Windtberg

5 Post Office Box 51826

6 Phoenix, AZ 85076-1826

7 Attorneys for Capital One Auto Finance, a
8 division of Capital One N.A.

9 Certificate of Service

10 I certify that on August 22, 2017, a true and correct copy of the above and foregoing was served
11 upon the following parties by regular first-class mail:

12 Dianne C. Kerns
13 7320 N. La Cholla #154 PMB 413
14 Tucson, AZ 85741-2305

15 Wayne Mortensen
16 Mortensen Law Offices, PLLC
17 1901 E. University Dr., Ste. 360
18 Mesa, AZ 85203

19 Bryan W. Burcham
20 1910 S Avenue A, #13B
21 Yuma, AZ 85364

22 Hilaria Burcham
23 6502 E. 42nd St.
24 Tucson, AZ 85730

25 /s/ Michael Zdancewicz

EXHIBIT 1

1. FINANCE CHARGE AND PAYMENTS

- a. **How we will figure Finance Charge.** We will figure the Finance Charge on a daily basis at the Annual Percentage Rate on the unpaid part of the Amount Financed with a day counted as 1/365th of a year (or 1/366th in a leap year).
- b. **How we will apply payments.** We may apply each payment to the earned and unpaid part of the Finance Charge, to the unpaid part of the Amount Financed and to other amounts you owe under this contract in any order we choose.
- c. **How late payments or early payments change what you must pay.** We based the Finance Charge, Total of Payments, and Total Sale Price shown on the front on the assumption that you will make every payment on the day it is due. Your Finance Charge, Total of Payments, and Total Sale Price will be more if you pay late and less if you pay early. Changes may take the form of a larger or smaller final payment or, at our option, more or fewer payments of the same amount as your scheduled payment with a smaller final payment. We will send you a notice telling you about these changes before the final scheduled payment is due.
- d. **You may prepay.** You may prepay all or part of the unpaid part of the Amount Financed at any time without penalty. If you do so, you must pay the earned and unpaid part of the Finance Charge and all other amounts due up to the date of your payment.

2. YOUR OTHER PROMISES TO US

- a. If the vehicle is damaged, destroyed, or missing. You agree to pay us all you owe under this contract even if the vehicle is damaged, destroyed, or missing.
- b. **Using the vehicle.** You agree not to remove the vehicle from the U.S. or Canada, or to sell, rent, lease, or transfer any interest in the vehicle or this contract without our written permission. You agree not to expose the vehicle to misuse, seizure, confiscation, or involuntary transfer. If we say any repairs, storage bills, taxes, fines, or charges on the vehicle, you agree to repay the amount when we ask for it.
- c. **Security Interest.** You give us a security interest in:
 - The vehicle and all parts or goods put on it;
 - All money or goods received (proceeds) for the vehicle;
 - All insurance, maintenance, service, or other contracts we finance for you; and
 - All proceeds from insurance, maintenance, service, or other contracts we finance for you. This includes any refunds of premiums or charges from the contracts.This secures payment of all you owe on this contract. It also secures your other agreements in this contract. You will make sure the title shows our security interest (lien) in the vehicle.
- d. **Insurance you must have on the vehicle.** You agree to have physical damage insurance covering loss of or damage to the vehicle for the term of this contract. The insurance must cover our interest in the vehicle. If you do not have this insurance, we may, if we choose, buy physical damage insurance. If we decide to buy physical damage insurance, we may either buy insurance that covers your interest and our interest in the vehicle, or buy insurance that covers only our interest. If we buy either type of insurance, we will tell you which type and the charge you must pay. The charge will be the cost of the insurance and a finance charge equal to the Annual Percentage Rate shown on the front of this contract, or, at our option, the highest rate the law permits. If the vehicle is lost or damaged, you agree that we may use any insurance settlement to reduce what you owe or repair the vehicle.
- e. **What happens to returned insurance, maintenance, service, or other contract charges.** If we get a refund of insurance, maintenance, service, or other contract charges, we will subtract the refund from what you owe.

3. IF YOU PAY LATE OR BREAK YOUR OTHER PROMISES

- a. **You may owe late charges.** You will pay a late charge on each late payment as shown on the front. Acceptance of a late payment or late charge does not excuse your late payment or mean that you may keep making late payments. If you pay late, we may also take the steps described below.
- b. **You may have to pay all you owe at once.** If you break your promises (default), we may demand that you pay all you owe on this contract at once. Default means:
 - You do not pay any payment on time;
 - You give us false, incomplete, or misleading information on a credit application;
 - You start a proceeding in bankruptcy or one is started against you or your property; or
 - You break any agreements in this contract.The amount you will owe will be the unpaid part of the Amount Financed plus the earned and unpaid part of the Finance Charge, any late charges, and any amounts due because you defaulted.
- c. **Debtor's Liability for Failure to Return Vehicle:** If you are in default, we may send you a notice of default. If you fail to return a motor vehicle subject to a security interest within 30 days after receiving notice of default. A notice of default may be mailed to the address on the contract. It is your responsibility to keep the listed address current. Unlawful failure to return a motor vehicle subject to a security interest is a class 6 felony. Assuming there are no aggravating circumstances, and you have no prior felony convictions, the maximum penalty is 1 year in prison and a \$150,000 fine.
- d. **You may have to pay collection costs.** If we hire an attorney to collect what you owe, you will pay the attorney's fee and court costs as the law allows. You will also pay any reasonable collection costs we incur as the law allows.

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS THEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

The preceding NOTICE applies only if the "personal, family or household" box in the "Primary Use for Which Purchased" section of this contract is checked. In all other cases, Buyer will not assert against any subsequent holder or assignee of this contract any claims or defenses the Buyer (debtor) may have against the Seller, or against the manufacturer of the vehicle or equipment obtained under this contract.

GUARANTEE

The undersigned, jointly and severally, guarantees payment of all amounts owing under this contract and the payment upon demand of the entire amount owing on this contract in the event of default in payment by Buyer named therein. The undersigned waives notice of performance, demands for performance, notice of non-performance, protests, notice of protests, notice of dishonor, notice of acceptance of this Guaranty, of any extensions in time of payment, of sale of any of the collateral and of all other notices to which the undersigned would be otherwise entitled by law and agrees to pay all amounts owing thereunder upon demand, without requiring any action or proceeding against Buyer, and specifically waives any right to require action against Buyer as provided in A.R.S. §§ 12-1541 et seq. The undersigned agrees to deliver to Seller, or after assignment, to Assignee timely financial statements and any other information relating to the undersigned's financial condition as may be reasonably requested. The undersigned acknowledges receipt from the Seller, prior to signing below, of a separate "Notice to Cosigner."

DATED AT

GUARANTOR

DATED AT

GUARANTOR

Marital Community Property Jurisdiction: The undersigned spouse of the Guarantor joins in the execution of this guaranty for the purpose of binding the marital property of the Guarantor, and the undersigned, in accordance with A.R.S. § 25-214 or other applicable law. THE UNDERSIGNED SPOUSE OF THE GUARANTOR ACKNOWLEDGES RECEIPT FROM THE SELLER, PRIOR TO SIGNING BELOW, OF A SEPARATE "NOTICE TO COSIGNER."

Date

Spouse of the Guarantor

ARBITRATION CLAUSE

PLEASE REVIEW - IMPORTANT - AFFECTS YOUR LEGAL RIGHTS

1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR CLASS CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Clause shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. Arbitration shall be conducted by the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605 (www.adr.org), or any other organization that you choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district in which you reside unless the Creditor-Seller is a party to the claim or dispute, in which case the hearing will be held in the federal district where this contract was executed. We will advance your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of \$2500, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Clause, then the provisions of this Arbitration Clause shall control. The arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is \$0 or exceeds of \$100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel. The appealing party requesting new arbitration shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs. Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and not by any state law concerning arbitration.

You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to seek remedies in small claims court for disputes outside court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Clause shall survive any termination, payoff or transfer of this contract. If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Clause shall be unenforceable. Notwithstanding any provision of this Arbitration Clause, the validity and scope of the waiver of class action rights shall be decided by the court and not by the arbitrator.

EXHIBIT 2

ARIZONA CERTIFICATE OF TITLE

ADOT

Inventory Control

3272793

Motor Vehicle Division

48-7200 R08/15 azdot.gov

Vehicle Identification Number

Year

Make

Model

Body Style

1G1ZC5E14BF123337

2011

CHEV

4DSD

First Registered

List Price

Mobile Home Manufacturer

Unit Number

02/2011

022825

CAPITAL ONE AUTO FINANCE

PO BOX 660068

SACRAMENTO CA 95866-0068

Title Number

Issue Date

Film Number

Odometer Reading (no tenths)

004N011067088

03082011

L067004N44

0000012 A

Previous Title Number

State

Issue Date

Previous Film Number

MCO

00000000

ORIGINAL

* A - Actual Mileage
B - Mileage in excess of the odometer mechanical limits
C - NOT Actual Mileage, WARNING ODOMETER DISCREPANCY

Arizona Brands

Previous Brand

State Previous Brand

State Previous Brand

State Other States With Brands

Owners/Lessees

HILARIA BURCHAM

6502 E 42ND ST

TUCSON

OR

AZ 857301619

BRIAN WAYNE BURCHAM

Lienholder(s) as of the print date. (Additional liens may exist. Check Lien Motor Vehicle Inquiry on <https://servicearizona.com> to find all current liens.)

FIRST LIEN-

LIEN DATE: 01222011

CAPITAL ONE AUTO FINANCE

PO BOX 660068

SACRAMENTO

CA 958650068

LIEN RELEASE

Lienholder Name		Acknowledged before me this date.		Notary Public Signature	
Lien Amount	Lienholder Signature	Date	County	State	Commission Expires

VOID WITHOUT EAGLE WATERMARK OR IF ALTERED OR ERASED

EXHIBIT 3

N.A.D.A. Official Used Car Guide Vehicle Valuation

Print Date: August 16, 2017

Customer: Burcham, Hilaria

File No.: COAF-1019550

Vehicle Description: 2011 CHEVROLET Malibu-4 Cyl. Sedan 4D LT

VIN: 1G1ZC5E14BF123337

Base Values

Retail: \$ 8050.00

Wholesale/Trade-in: \$ 5625.00

Optional Equipment/Adjustments

Estimated Miles 87500 \$ 0.00

Total Adjusted N.A.D.A. Used Car Guide Values

Retail: \$ 8050.00

Retail/Wholesale Average: \$ 6837.50

Reference 08/2017 Desert Southwest